No. 76-5416

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

RUBY JONES,

Petitioner

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF THE RESPONDENTS

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OPINION BELOW

The opinion of the Supreme Court of Colorado (No. 26828) is reported at 550 P. 2d 339.

JURISDICTION

The opinion of the Colorado Supreme Court was entered on May 24, 1976 (A. 43). A timely petition for rehearing was filed, and was denied by the Colorado

Supreme Court on June 21, 1976 (A. 52). A timely petition for Writ of Certiorari was granted on January 17, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

May a State's wrongful death action be transformed into a "constitutional tort", irrespective of *Erie* and Amendment X of the United States Constitution?

Is there a federal common law from which a measure of damages may be formulated for a constitutional tort, irrespective of *Erie* and Amendment X of the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, ARTICLE III, provides in part:

"SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

"SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. * * * *"

U.S. Constitution, Amendment X, provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Const., Amend. XIV, provides in part:

* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *

42 U.S.C. §1983, provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. §1979).

42 U.S.C. §1988, provides:

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and of Title 18 for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R.S. §722).

Colorado Revised Statutes Annotated (1973) provides:

"*13-21-201. Damages for death.* (1) When any person dies from any injury resulting from or occa-

sioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employe any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

(a) By the husband or wife of deceased; or

(b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased; or

(c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show

that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution."

* * *

"*13-21-202. Action notwithstanding death.* When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured."

* * *

"*13-21-203. Limitation on damages.* (1) All damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed.

(2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on a wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default."

STATEMENT OF THE CASE

On October 15, 1973, the Petitioner, Ruby Jones, filed a complaint in the District Court in and for the City and County of Denver. Petitioner named police officers Douglas Hildebrant, Brian Moran, and the City and County of Denver as Defendants. (R. 5). In her original complaint, Petitioner stated four claims for relief: (1) battery, (2) negligence; (3) for deprivation of civil rights 42 U.S.C. §1983; and (4) for deprivation of civil rights based upon conspiracy, 42 U.S.C. §1985, §1986. In an amended complaint subsequently filed, the fourth claim for relief was dismissed and Officer Moran was dropped from the action. (A. 2).

The facts which gave rise to this cause of action occurred on February 5, 1972. On the evening of February 5, Officers Hildebrant and Moran, responding to a silent burglar alarm, came upon Petitioner's son (Larry Jones).

Immediately after discovery, a chase ensued and during said chase, Officer Hildebrant shot and killed Larry Jones.[1] (R.).

In their answer, Respondents admitted: (1) that Officer Hildebrant did shoot Petitioner's son; and (2) Officer Hildebrant acted under color of state law and within the course and scope of his employment. (A. 5).

Respondents asserted as affirmative defenses that: (1) Officer Hildebrant acted in self defense, and (2) used no more force than was reasonably necessary in an effort to apprehend the Decedent, a fleeing felon, in the belief that his own life and the lives of others were in danger at the time of the shooting. Respondents also asserted that Officer Hildebrant had probable cause and a reasonable apprehension of present threat to life, both his own and others. (A. 5).

On November 11, 1974, the trial began. (R. 37). On November 14, 1974, Petitioner's 42 U.S.C. §1983 claim was struck. (A. 31). The Trial Judge Charles Goldberg, held that Petitioner's §1983 claim was coextensive, congruent

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[1] Neither the Court nor the parties have access to a complete transcript of the trial because none was prepared for consideration by the Supreme Court of Colorado. Accordingly, an accurate and complete recital of the facts which gave rise to this cause of action, are unfortunately, unavailable, from the Record before this Court.

[2] Quoting from the trial Court's opinion (A. 30) "... The Court would note that Mrs. Jones, in her Third Claim for Relief, claims deprivation of her civil rights in three material respects. Number one, her child's right to life. Two, the right to her child's freedom from physical abuse, coercion, intimidation and physical death. Three, her right to her child's equal protection of the law is absurd at this juncture when considered in light of the evidence produced at trial. Her other

and redundant with her claim under the Colorado wrongful death statute.[2] (A. 30).

In addition, the trial Court ruled that the wrongful death statute did not permit the recovery of punitive damages (A. 20), and it had also limited Petitioner's recovery to a maximum of $45,000 because she was not a dependent of the deceased. (A. 15).

The case thus went to the jury on Petitioner's state law claims only. On the issue of damages, the jury was given two instructions numbered 19 and 20 (R. 73, Folio 119 and R. 74, Folio 120, respectively),[3] and returned a verdict finding the issues of liability under state law in Petitioner's favor and assessed damages of $1,500 against Respondents. (A. 38).

Petitioner subsequently filed her motion for new trial (A. 40) on the issue of damages which the trial judge denied (R. 98). Plaintiff next filed a notice of appeal (A. 42) to the Supreme Court of Colorado, which affirmed the judgment of the trial court. (A. 43).

On Petitioner's appeal, she asserted that the judgment

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claims, however, can only be coextensive with her son's rights in these areas; that is to say, she can have no greater rights to her son's life than he, himself, had to his own life. And to the extent that Larry Jones had inalienable rights to life and freedom from physical abuse, these rights are covered by substantive tort law which includes the defenses available under that law, particularly the defenses of self-defense and the fleeing felon laws. Therefore, the Court feels that in this case the Plaintiff's First and Third Claims for Relief are coextensive, congruent [and] redundant in this case when considered in the light of the evidence. The Court can envision, however, where a case could arise where the state and federal claims are not redundant, but the Court does not feel that under the evidence established in this case that that has been established."

should be reversed and a new trial ordered on the issue of damages because (1) her damages under the wrongful death statute were unconstitutionally restricted by the net pecuniary loss rule, (2) that her recovery was inadequate, as a matter of law, and (3) that additional damages should have been permitted under her §1983 claim because that cause of action was not limited by the net pecuniary loss rule.

With respect to Petitioner's appeal on the limitations placed on damages recoverable under the state law claims,

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[3] Because of the number of issues fairly comprised within the issue presented to the court by Petitioner, we deem it necessary to set out the instructions of damages in detail.

Instruction #19—"If you find in favor of the Plaintiff, Ruby Jones, on her claim of negligence you shall assess as her damages, insofar as they have been established by the evidence, an amount which will fairly and justly compensate her for the net pecuniary or financial loss, if any, she sustained by reason of the death of Larry Jones, but not exceeding the sum of $45,000. In assessing damages, you may consider any mitigating or aggravating circumstances attending any such wrongful act, neglect or default.

The net pecuniary or financial loss is equivalent to the pecuniary or financial benefit, if any, which the Plaintiff may reasonably have expected to receive from Larry Jones had he lived.

Whether pecuniary injury has been proven by the evidence is for you to determine. Your verdict must be based upon evidence and not upon speculation, guess, or conjecture. No recovery is allowable for solace, grief or sorrow."

Instruction #20—"The net pecuniary loss, if any, sustained by the Plaintiff, Ruby Jones, as the parent of Larry Jones would be the reasonable value of any services Larry Jones might have rendered and earnings he might have made while a minor together with any support he might reasonably have been expected to provide the Plaintiff, Ruby Jones, after he became on adult, less the expenses the Plaintiff might reasonably have incurred in maintaining Larry Jones and providing him with an education.

In determining the net pecuniary loss, if any, you should consider Larry Jones' as well as the Plaintiff's ages, health, conditions of life, probable duration of lives and their abilities to earn money. You should also consider Larry Jones' habits of industry and his disposition to aid and assist the Plaintiff, Ruby Jones, taking into account not only the legal relationship between Larry Jones and the Plaintiff, Ruby Jones, but also the actual relations between them as manifested by acts of service or pecuniary assistance, if any, rendered by Larry Jones to the Plaintiff, Ruby Jones.

the Colorado Supreme Court declined to discard the "net pecuniary loss" rule.[4] Further, the Colorado Supreme Court upheld the verdict as being not inadequate as a matter of law under the evidence presented.[5] (A. 46).

Neither of these issues is presented for review by this Court, nor could they be as pointed out in the Lawyer's Committee Amici Curiae Brief.

Plaintiff's petition for rehearing was denied. (A. 52). Subsequently, this Court granted certiorari. (A. 58).

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[4] "The suggestion that this court should depart from its prior pronouncements defining the measure of damages recoverable under our wrongful death statute would do utter violence to the well-established rule of statutory construction that when a legislature repeatedly re-enacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent, and in such circumstances it must be considered that the particular statute is re-enacted with the understanding that there be adherence by the judiciary to its former construction . . ." (A. 45).

[5] "Based on our review of this record, we cannot conclude that the verdict is 'grossly and manifestly inadequate' as to 'clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other considerations'. The evidence of plaintiff's damages was vague and insubstantial." (A. 45).

SUMMARY OF THE ARGUMENT

I. The Creation Of A §1983 Wrongful Death Action Is Inconsistent With Amendment X And The Erie Doctrine

A. The creation of a federal common law in a §1983 civil rights action is contrary to the *Erie* doctrine.

1. This would thrust the federal and state judicial systems into a state of confusion.

2. Federal courts would have no statutory guidelines by which to ascertain the measure of damages.

3. The effect of a §1983 federal common law must necessarily result in the rejection of *Erie v. Tompkins.*

4. This would return the federal courts to the judicial adventurism of the *Swift* v. *Toyson* era.

B. Amendment X precludes any federal common law in §1983 wrongful death actions.

1. Tort law is, and has traditionally been, an area governed by state law.

2. No Constitutional or statutory authorization exists to enable a federal common law to govern §1983 wrongful death actions.

II. Petitioner Was Provided Access To The Courts Through The Colorado Wrongful Death Act. This Is Consistent With The Intent And Purpose Of The Civil Rights Act

A. It was Petitioner's choice to bring this action in the Colorado courts. Therefore, she is bound by the provisions of the Colorado Wrongful Death Act.

B. Petitioner has not been denied due process of law nor the protections envisioned by the Civil Rights Act.

1. If Petitioner had a §1983 claim she could have pursued it in the Federal District Court.

2. One of the reasons for the enactment of §1983 was to ensure that plaintiffs in civil rights cases have a federal forum in which to vindicate their claims where access to the state courts is being denied.

3. Adjudication of Petitioner's claim in state court was consistent with the intent and purpose of the Civil Rights Act.

III. The Creation Of A Federal Wrongful Death Remedy Would, In Fact, Create A Constitutional Tort Law

A. Petitioner's action is not transmuted into an exclusively federal claim simply because the defendant is the state, acting through its agent police officer.

1. Following Petitioner's line of reasoning, any tort committed by one acting "under color of law" would be a violation of the Fourteenth Amendment.

2. Further, Petitioner apparently would have all such suits governed by a non-existent federal rule of damages.

B. It was *not* the intent of Congress to include wrongful death actions in the Ku Klux Act of 1871, now codified as §1983.

1. *Congress specifically considered and rejected the inclusion of any type of wrongful death provision in §1983.*

C. The Procedural guarantees of the Fourteenth Amendment Due Process Clause cannot be the source of a Constitutional tort law.

1. The Fourteenth Amendment is limited by the fact that it does not alter the fundamental balance between the states and the national government as embodied in Amendment X.

2. The very foundation of federalism would be threatened by creation of a Constitutional tort law.

D. The creation of a Constitutional tort law would abrogate state tort law in civil rights actions.

1. The §1983 remedy was intended by Congress to be supplemental. It is properly used where a state remedy does not exist, or where a claimant is being denied access to the state courts to pursue [her] claim.

2. Tort law is state law and should not be proscribed by a Constitutional tort law.

E. Congress, not the courts, is the proper branch to determine whether any body of general federal tort law is necessary.

1. The unique problems of such a proposal are more properly a matter of legislative adjudication.

IV. §1983 Does Not Expressly Provide For Wrongful Death Actions, Nor Can They Be Implied

A. Wrongful death actions were not recognized at common law, accordingly, being a creature of statute, they must be strictly interpreted.

B. Wrongful death actions cannot be implied from §1983.

1. Congress considered, debated and rejected the inclusion of wrongful death in §1983.

2. All the Circuit Courts that have analyzed the problem of the inclusion of *wrongful death* in §1983 have rejected it.

3. The remedy for wrongful death provided by the Colorado Wrongful Death Act is not inconsistent with the intent and purpose of the Civil Rights Act.

ARGUMENT

I. The Erie Doctrine And Amendment X Of The Constitution Militate Against The Creation Of A §1983 Federal Wrongful Death Action By The Creation Of A Constitutional Tort

Petitioner asks this Court to establish a Federal Common Law and return us to the days of *Swift* v. *Tyson*, 41 (16 Pet.) U.S. 1; 10L., ed 865 (1842), when our courts were under the erroneous assumption that there was a Federal Common Law in matters such as the one before the Court.

The original colonies in setting up their nation in infinite wisdom created a Constitution and granted to the Federal Courts certain powers as set out in Article III of the Constitution and left all others to the states, Amendment X of the Constitution.

Therefore, the United States is a country that exists by virtue of its Constitution, laws of Congress and treaties made pursuant thereto. These being the governing tools, there can be no Federal Common Law affecting cases such as the one before this Court.

If there is any Federal Common Law, it must be found in Article III of the Constitution and only in the following instances:

a. Cases in which a state is a party.

b. Cases in admiralty and maritime law.

c. Cases involving proprietary duties of the United States.

d. Cases in international law.

Only in the above matters do the Federal Courts have authority to act without consulting state law.

From 1842 to 1938 our judicial system was operating on the misconception that there was a Federal Common Law, *Swift* v. *Tyson*, supra, that brought us nothing but confusion. Mr. Justice Brandeis, in *Erie Railroad* v. *Tompkins*, 304 U.S. 64, in a scholarly opinion stated that there cannot be any Federal Common Law, and after great concern and consideration, this Court in its wisdom overruled *Swift* v. *Tyson*, supra:

> "If only the question of statutes construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so."

Notwithstanding the constitutional ground taken in *Erie Railroad* v. *Tompkins*, supra, which was precisely the right ground—indeed the only tenable one—many of our inferior courts have erroneously applied in their decisions what they feel should be a Federal Common Law when their views conflict with the state's law.

This Court in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, (1969) added to the confusion and doubt that exists when it stated at page 229:

> "This means, as we read §1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."

This statement does not permit us to use any kind of definitive rule of law, but leaves it up to the inferior court's views to tell us what the law should be.

There is no Federal Common Law that can be applied to these types of cases as long as *Erie Railroad* v. *Tompkins, supra,* is on the books.

The choice of law in Civil Rights cases is now complicated, with gaps all through the Act as it is presently written. It is not this Court's duty or prerogative to fill these gaps. It is the duty of Congress either to amend or write a new Civil Rights law. If this is not accomplished, we will have nothing but a hodgepodge of law as each inferior court will be using its own theory of law. Until Congress amends §1983 or §1988 as to wrongful death cases, only the state law can and should be used as stated in *Erie Railroad* v. *Tompkins,* supra, page 78:

> "Except in matters governed by the Federal Constitution or Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Congress created the Federal Courts, under the United States Constitution, and it is up to Congress to set out in a statute what the Federal Courts can and cannot do.

Since the Congress did not see fit to provide a wrongful death statute in the Civil Rights Act, §1983 or §1988, the Federal Courts on their own initiative should not create any wrongful death law, as this would be creating a Federal Common Law where none exists.

This Court has placed limitations on the creation of federal common law.

> "As respects the creation by the federal courts of common law rights, it is perhaps needless to state that we are not in the free-wheeling days ante-dating *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64. The instances where we have created federal common law are few and restricted. *Wheelden* v. *Wheeler,* 373 U.S. 647 (1963) p. 651.

Petitioner elected to have her day in a state court, and she is bound by state law, whether that law be promulgated by the judiciary or by statute. The Federal Court is only a few blocks distant from the state court in this city, and if Petitioner thought she had greater rights in a federal court, she should have availed herself of that jurisdiction. But, what she was trying to do was take that part of the state law that suited her fancy and any federal law that she might request the state court on its own initiative to consider, to make available to her greater rights than she was allowed under strictly state law.

However, even by using federal jurisdiction, she could not gain any greater relief or rights than she was afforded in the state court, as the Federal Court is required to follow state law if there is no applicable federal law, and it is our position that there is no applicable federal law in wrongful death cases. See *Guaranty Trust Company of New York* v. *Grace W. York,* 326 U. S. 99, where it is further stated at pages 101 and 102:

> "******Erie Railroad* v. *Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare.

> Accordingly, federal courts deemed themselves free to ascertain what Reason and therefore Law, required wholly independent of authoritatively declared state law, even in cases where a legal right as the basis for relief was created by state authority and could not be created by federal authority****" Citations omitted.

Mr. Justice Brandeis stated the law in *Erie Railroad* v. *Tompkins* so simply that we must wonder why our inferior courts cannot follow that complementary concept that federal courts must follow state decisions in matters of law appropriately cognizable by states; and we must wonder why anyone should want to shy away from Mr. Justice Brandeis' pronouncement and to complicate matters.

Establishing a federal common law measure of damages would revert the law to a "brooding omnipresence" of reason, whereby federal courts would be free to ascertain measures of damages without statutory guidelines.

Therefore, what Federal Common Law this country had for over a century was put to rest in *Erie Railroad* v. *Tompkins*, supra, when *Swift* v. *Tyson*, supra, was overruled.

II. Justice Is Not Lacking In This Case. Petitioner Was Afforded a Remedy Under The Colorado Wrongful Death Act And Therefore Was Not Denied Access To the Courts. Petitioner Has No Personal Constitutional Right Actionable Under 42 U.S.C. §1983.

It is not at all clear what Petitioner asks of this Court.

Apparently, Petitioner claims that she has a constitutional right to the life of her child, the right of parenthood, and that that right is actionable pursuant to 42 U.S.C. §1983.

Petitioner impliedly admits that her claim is uniquely brought under 42 U.S.C. §1983 in that she cites as authority a number of decisions which have attempted to resolve the problem of survival of actions brought under 42 U.S.C. §1983.

If Petitioner is pursuing her own separate constitutional right to the life of her child, there is no problem of survival of her 42 U.S.C. §1983 claim in that there is no indication that Petitioner is deceased.

The Supreme Court of Colorado was of the opinion:

> "***** the state did not directly attempt to restrict her own personal decisions relating to procreation, contraception, and child-rearing which are involved in *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d. 510 (1965), and *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042 (1923). Although the death of a family member represents a loss to her, we, nonetheless, are of the opinion that §1983 was not designed to compensate for these collateral losses resulting from injuries to others. Otherwise, damages would infinitely extend not only to parents and children, but to siblings and perhaps even to a 'family' of close friends. The interests protected by §1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute." 550 P.2d at 345.

Petitioner, Ruby Jones, contends that since she is the mother of the Deceased, that she has a claim under §1983

for the violation of *her* own constitutional rights. Those rights are asserted to be the rights of "parenthood," which may not be deprived without due process of law. This argument derives by tortuous analogy from *Mattis* v. *Schnarr*, 502 F.2d 588 (8th Cir. 1974), *Stanley* v. *Illinois*, 405 U.S. 645 (1972), and *Armstrong* v. *Manzo*, 380 U.S. 545 (1965).

This argument has no merit. *Mattis* merely held that a parent has sufficient interest in the life of his child to give the parent standing to challenge the constitutionality of Missouri's justifiable homicide statute upon which a policeman relied in killing the parent's child during the course of an arrest; no finding of a "constitutional" right in the child's life was necessary for the purpose of standing to assert the constitutional challenge.

Stanley and *Armstrong* recognized parental rights as protected under the Fourteenth Amendment, and held that those rights could not be infringed upon *by adjudication without notice* to the parent of the judicial proceeding and an opportunity to be heard.

Due process is afforded to Ruby Jones by the availability of Colorado's wrongful death action. *Jones* v. *Hildebrant*, 550 P.2d 339 (Colo. 1976).

> "The mere allegation that a tort has been committed is insufficient in itself to bring plaintiff's claim within the protection of the Civil Rights Act." *Evain* v. *Conlisk*, 364 F. Supp. 1188 N.D. Ill. 1973).

Accord, *Paul* v. *Davis*, 424 U.S. 693, (1976).

In *Evain*, a daughter contended that her constitutional rights—to care, love, association, and financial support—

were violated when her father was killed by Chicago police officers. The court denied that the daughter established a deprivation of violation of a constitutional right. 364 F.2d Supp. at 119. *Accord*, *James* v. *Murphy*, 392 F. Supp. 641, 646 (M.D. Ala. 1975).

III. Problems In The Creation Of The Constitutional Tort Of Federal Wrongful Death.

Petitioner appears alternatively to suggest that as a survivor of her son, Larry Jones, *she* has a right to pursue, under 42 U.S.C. §1983 via 42 U.S.C. §1988, and the Colorado Wrongful Death Act, Colorado Revised Statutes §13-21-201 et seq., her *child's right* to life, *his* right to freedom from physical abuse and intimidation and *his* right to equal protection of the laws,[6] all of which Petitioner claims were violated by the State, i.e., The City and County of Denver and its agent police officer.

Petitioner has asserted not a claim for deprivation of rights secured by the Fourteenth Amendment, but a claim for wrongful death under the laws of Colorado.

Petitioner, therefore, contends since Respondents are the State acting through the City and County of Denver and its agent police officer, that her wrongful death action is thereby transmuted into a claim for deprivation by the State of rights secured to her son by the Fourteenth Amendment.

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[6] It should also be pointed out that an attempt to sue under the civil rights statutes for the deprivation of another's constitutional rights is impermissible. *O'Malley* v. *Brierley*, 477 F. 2d 785 (3rd Cir. 1973).

This Court has recognized the illogic of such a contention and has noted that serious questions as to the proper relationship between the federal and state governments arise in any attempt to derive from the federal civil rights acts a body of general federal tort law. Cf. *Paul* v. *Davis*, 424 U.S. 693 (1976); *Greenwood* v. *Peacock*, 384 U.S. 808 (1966); *Griffin* v. *Breckinridge*, 403 U.S. 88 (1971); U.S. Constitution, Amendment X.

Quoting this Court in *Paul* v. *Davis*, 424 U.S. 693 (1976):

> "We, too, pause to consider the result should respondent's interpretation of §1983 and of the Fourteenth Amendment be accepted.
>
> If Respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under §1983. And since it is surely far more clear from the language of the Fourteenth Amendment that 'life' is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under §1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by Respondent."

The Supreme Court of Colorado denied Petitioner's request to transmute Colorado tort law into a new federal form which could fairly be termed constitutional tort law. *Jones* v. *Hildebrant*, 550 P.2d 339 (1976).

The effect of the decision of the Supreme Court of Colorado is that its state tort law ought to be left intact, and that the purpose of §1983 to provide a federal forum where a claimant has been denied access to the state courts ought not to be expanded further. Cf. *Paul* v. *Davis*, supra. Stated differently, the Supreme Court of Colorado held that Petitioner had a right to her son's life and that she had a state forum remedy readily accessible for vindication of her rights. Had Petitioner's right to sue in the state court been hampered by state action, she certainly would have had a valid §1983 claim.

In *Screws* v. *U.S.*, 325 U.S. 91, 108-109 (1945), this Court said, "to make all torts of state officials federal crimes" was not the intention of Congress in guaranteeing the application of the Fourteenth Amendment to the states. Such, however, would be the effect if this Court grants Petitioner's claim that she will be deprived of her Fourteenth Amendment rights of due process if there is not a uniform federal remedy and rule of damages created. The application of this new remedy and rule of damages would fall almost exclusively upon public officials and render any tort they commit in their official capacities actionable under a federal remedy and rule of damages, rather than the

state tort law and its attendant rule of damages. This could lead to the situation this Court warned of in *Paul* v. *Davis*, supra. In that case the Court explained that the Fourteenth Amendment was not to be viewed in such an overreaching manner. Rather, the Amendment was limited by the fact that it "did not alter the basic relation between the states and the national government." *Screws* v. *U.S.*, supra, at 108-109. It is this very relation that is threatened by Petitioner's claim upon the Fourteenth Amendment.

If this Court creates a constitutional tort law superseding that of the states in certain areas by means of §1983 and the Fourteenth Amendment, it is applying that Amendment in precisely the manner found objectionable in *Paul* v. *Davis*, supra. Petitioner apparently believes that,

> "The Fourteenth Amendment's Due Process clause should *ex proprio vigore* extend to [her] a right to be free of injury wherever the state may be characterized as the tort feasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states. We have noted the 'Constitutional shoals' that confront any attempt to derive from Congressional civil rights statutes a body of general federal tort law, *Griffin* v. *Breckinridge*, 403 U.S. 88, 101-102, 29 L.Ed. 2d 338, 91 S. Ct. 1790 (1971); a fortiori the procedural guarantee of the Due Process clause cannot be the source for such law." *Paul* v. *Davis*, *47 L.Ed. 405, 413-414.*

Petitioner asserts there should be a uniform federal rule of damages in §1983 wrongful death actions and asks this Court to create that rule. This, in effect, creates a "Constitutional tort law" for use in §1983 actions and thus would be a unique and extremely far-reaching decision for

this Court to make. In discussing whether or not to judicially fashion a federal uniform statute of limitations, this Court in *International Union, United Auto, et al.* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 702-703 (1966) stated,

> "Thus, although a uniform limitations provision for Section 301 [of the Labor Management Relations Act] suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us.
>
> That Congress did not provide a uniform limitations provision for Section 301 suits is not an argument for judicially creating one . . ."

The same is true of §1983-§1988. Congress has not deemed it necessary to create a uniform rule of damages in §1983 actions and thus this court should not create one.

The creation of a Constitutional tort law is perhaps most inappropriate in light of the almost exclusively state orientation of tort law. This is an area where federal law, statutory or common, has been only minimally applicable.[7] Where Congress has deemed it necessary to apply federal law to the area of torts, it has enacted special legislation, such as the Federal Employers' Liability Act, 45 U.S.C. 51; The Jones Act, 46 U.S.C. 688, etc. In the case of §1983, Congress has not implemented any legislation providing for damages, besides §1988. This is a strong indication that Congress does not sanction the abrogation of state tort law in favor of a uniform federal rule of some sort.

Further, Petitioner's argument to establish a uniform

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[7] See, 32 AmJur 2d Section 65.

federal common law to measure damages under a §1983 action must fail because there is no congressional basis or intent authorizing the federal courts to create such a uniform measure of damages. Petitioner misconstrues the congressional intent and purpose of the Ku Klux Klan Act of 1871, 17 Stat 13 §1 now codified as 42. U.S.C. §1983 when she alleges that the congressional intent indicates that §1983 was intended to control state activity by providing an exclusive federal remedy for the violation of federal civil rights.

This Court, in *Monroe* v. *Pape* (365, U.S. 167, 1961) conducted a painstaking and thorough analysis of the history of the Civil Rights Acts in order to explain the background of the Act and the intent of Congress in construing the Acts.

In this opinion, Justice Douglas stated:

> When the bill that became the Act of April 20, 1871, was being debated in the Senate, Senator Sherman of Ohio proposed an amendment which would have made "the inhabitants of the county, city or parish" in which certain acts of violence occurred liable "to pay full compensation" to the person damaged *or his widow or legal representative.* (Id at 188) (Emphasis added).

This Court went on to examine whether or not it was the intent of Congress to "[I]mpose civil liability on municipalities . . ." (Id. at p. 190). This Court noted that there was considerable opportunity for debate on this subject and that liability on municipalities was not included in the final version of §1983. Thus, this Court reasoned, it would be improper to construe the word "person" to include municipalities in the context of §1983 since the Congress specifically considered and rejected such a proposal. This line of

reasoning was also followed in *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), where the same problem in a slightly different context was considered.

We note that the passage quoted from Justice Douglas' opinion (supra) includes the words ". . . or his widow or legal representative." We further note that this passage was specifically *excluded* from the final version of §1983. It is our strong contention, using the same line of reasoning this Court used in considering municipal liability, that it was beyond the express intent of Congress to include Survival/Wrongful Death actions from §1983. We further urge that it is inconceivable that Congress could have merely "overlooked" this lack of survival aspect of §1983 since there was ample opportunity to consider and debate the matter; an express survival provision *was* included in §1985/1986. Furthermore, a comparison of §1983 and the original amendment (Cong. Globe, 42d Cong. 1st Sess., p. 663) (1871)[8] can lead us to no other conclusion. Therefore, it is our strongest contention that Congress intended to specifically *exclude* such actions from the scope of §1983.

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[8] The specific Amendment Justice Douglas was interpreting for the Court in *Monroe* v. *Pape*, supra, reads as follows:

> "§7. That if any house, tenement, cabin, shop, building, barn or grocery shall be unlawfully or feloniously demolished, pulled down, burned or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; [or if any persons shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons] riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him from (for) exercising any such right, or by reason of his race, color, or previous condition of servitude, *in every such case the inhabitant of the county, city, or parish in which any of the said offenses*

In *Monroe* v. *Pape*, 365 U.S. 167 (1961), this Court traced the legislative history of §1983 and determined its purpose. First, it is to override certain state laws ". . . amounting to invidious legislation by states against the rights or privileges of citizens of the United States." Cong. Globe, 42d Cong., 1st Sess., p. 244. Second, to provide a remedy where state law is inadequate. Clearly, congressional intent was not to provide an exclusive federal remedy, but rather, to provide citizens a forum to redress their grievances when state law failed to provide a remedy.

Finally, any decision to adopt some sort of uniform federal rules as to damages in §1983 wrongful death actions must come from the Congress and not the courts. The legislature is the proper forum in which to decide this question. In urging this Court to refrain from determination of Labor Board cases, Justice Black dissenting in *Smith* v. *Evening News Assn.*, 371 U.S. 195 (1962), 203-204 said,

> ". . . by permitting suits like this one to be filed it is now not only possible, but highly probable that unfair labor practice disputes will hang on like festering sores

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shall be committed, shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his legal representative, if dead; and such compensation may be recovered by such person *or his representative* by a suit in *any court of the United States* of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or *his legal representative,* and against said county, city or parish; (1) (A) and execution may be issued on a judgment rendered in such suit, (-), and may be levied upon any property, real or personal (,) of any person in said county, city or parish and the said county, city, or parish may recover the full amount of such judgment, costs or interest from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction." Cong. Globe, 42d Cong. 1st Sess., p. 663 (Emphasis added).

> that grow worse and worse with the years . . . But if such drastic changes are to be wrought . . . it seems important to me that this Court should wait for Congress to perform that operation."

IV. It Is Clear That There Is No Survival Of §1983 Wrongful Death Actions Via §1988

At the outset, we note that every court, confronted with the problems of survival of §1983 actions, has admitted that no *express* survival provision obtains in the Federal Civil Rights Statutes pertaining to §1983, nor in §1983 itself.

Four Circuit Courts of Appeal have addressed the problem of lack of express survival provisions for §1983 actions. All of the four circuits have turned to §1988 to authorize the incorporation of state survival and/or wrongful death statutes to fill the gap in Federal law. In addition, all of the Four Circuits, until recently, have incorporated whole state statutory provisions in this regard.

In no case has a Federal Court incorporated a state survival or wrongful death remedy[9] and yet rejected its accompanying damage remedy. This may be because of the language of Section §1988—that a state law, when incorporated into §1988, "Shall be extended to and govern the said courts in the trial *and disposition* of the cause . . ." 42 U.S.C. §1988 (Emphasis added).

Petitioner cites only one case (and our research agrees) in which a Federal Court has rejected a state sur-

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[9] In addition, there appears to be no reported cases in which punitive damages have been awarded in a §1983 case involving survival or wrongful death.

vival statute as inconsistent with the Federal Civil rights laws. That case is *Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir. 1977). In *Shaw*, the plaintiff instituted a §1983 suit alleging violation of constitutional rights through malicious prosecution. The plaintiff died before the suit came to trial. Under Louisiana law, the plaintiff's claim abated, and survived in favor of no one. The Fifth Circuit held that state law was inconsistent with Federal law under the §1988 because plaintiff (and his successors) were left without a *remedy* for the constitutional violation, in either federal or state courts. *Shaw*, 545 F. 2d at 983. Then, and only then, did the court consider it proper to look to a "federal common law" of survival to enforce the purpose of §1983 to provide a remedy for constitutional violations. Id. at 984 Cf. *Moragne* v. *State Marine Lines*, 398 U. S. 375 (1970).

Unlike the instant case, *Shaw* was concerned with the survival of an action *already* instituted, not a wrongful death action. This distinction was clearly brought out when the Fifth Circuit quoted with approval from the lower District Court's opinion the following:

> "We emphasize at the outset that we are not concerned with wrongful death actions for damages to others caused by the tort victim's death. Also to be distinguished are survival of causes of action, where the tort victim dies without bringing suit, and the question is whether a party may *institute* suit to recover for the tort victim's own damages." 391 F. Supp. at 1361. (Emphasis in original)

Moreover, the problem in *Shaw* was that the particular statute barred recovery in either state or federal courts. In the present case, Petitioner was not barred from pursuing

her wrongful death action in either state or federal court and indeed instituted her action in state court.

The unique solution developed by the Fifth Circuit may very well create more problems than it resolves. If a court, in a §1983 action, may utilize a state remedy via §1988, and excise those portions which it finds "inconsistent" with the spirit and purpose of the Federal Civil Rights Acts, it can plausibly be argued that the result would be inconsistent with the mandate of the Constitution of the United States. We are specifically addressing the privileges and Immunities/Equal Protection clauses of the Constitution. This solution (by the Fifth Circuit) could very well create the anomolous situation whereby a state court, entertaining a wrongful death action could reach two entirely different results, where one of the actions is brought under §1983. The effect would be to create two classes of citizenry within one jurisdiction by judicial decree. It would deny some citizens the privileges and immunities that would accrue to others. It is interesting to note that, had Petitioner's cause of action arisen through the act of one *not* operating "under color of state authority," she would find herself an unfortunate member of the class of citizenry she proposes to create. It is obvious, furthermore, that such a proposal would also create two classes of defendants.

Within the context of this Court's interpretation of §1988 in *Moor*, *Shaw* presents fewer problems in that survival statutes do not create causes of action,[10] they merely allow a cause of action to survive death to protect the interests of the decedent.

The Court in *Moor* v. *County of Alameda*, supra, at 703-705 stated:

> "Properly viewed . . . §1988 instructs the federal court as to what law to apply in causes of action arising under federal civil rights acts. But we do not believe that the section, without more, was meant to authorize the wholesale importation into federal law of state causes of action . . . *Considered in context . . . §1988 . . . was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act . . .*" (Emphasis added.)

It appears that the Court was adding a cautionary note in *Moor* with reference to the Court's previous holding in *Sullivan*, that both federal and state measures of damages may be utilized under §1988, i.e., the Court cautioned that both federal and state sources may be used only where necessary to protect the interests found in other provisions of the Act.

Moreover, it appears that this Court may have already overruled the dual remedy approach of *Sullivan*, supra, and implicitly rejected Petitioner's and the Circuit Courts' various §1988 incorporation of state torts *solution* to the lack of an express survival of §1983 death claims. See: *Runyon* v. *McCrary*, 427 U. S. 160, 96 S. Ct. 2586 (1976), where

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[10] Theis, *Shaw* v. *Garrison: Some Observations on 42 U.S.C. §1988 and Federal Common Law*, 36 La Law Review 681 (1976): "If section 1988 can be employed only 'in actions brought to enforce the substantive provisions of the Act, '49 protection under state or federal law of the survivors' interests seems inappropriate. *Brazier*, it is argued, incorrectly extended [50] recovery to protect the survivors' interests. Nothing in the text of section 1983 sanctions the protection of their interests. Although the survivors of a person whose life was taken as the result of deprivation of constitutional rights may be 'injured,' 'the party injured' in the text of section 1983 refers only to the victim of a deprivation of constitutional

plaintiffs sought to apply §1988 to incorporate in §1981 a state provision for the recovery of attorney fees. This Court firmly rejected the plainitiff's claim—advanced in effect by petitioner in the case at bar—that §1988,

> "embodies a uniquely broad commission to federal courts to search among the federal and state statutes and common law for the remedial devices and procedures which *best* enforce the substantive provisions of Section 1981 and other civil rights statutes." Id. at 2601 (emphasis added).

We question the impact on federal-state relations if this Court elects to incorporate *all or only* parts of the various state survival provisions and thereby creates a new §1983-§1988 Wrongful Death action,[6] a new "constitutional tort."

This Court would need to set forth the proper parties, elements and measure of damages for the Court created §1983-§1988 Wrongful Death action, and provide answers to several questions:

(1) Does §1988 authorize the incorporation of Colorado's Wrongful Death statute into federal law to allow a §1983 claim to survive death?

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rights. It would be a strained reading of section 1983 to say that the 'person' deprived of his rights and the 'party injured' were not always identical. A deprivation leading to death would not deprive the members of the family of constitutional rights belonging to themselves.[51] Although *Brazier* had a justifiable concern lest death—either fortuitous or intentionally inflicted—absolve a wrongdoer,[52] the interest to be protected is the vindication of the decedent's constitutional rights. State law insofar as it protects the survivors' interests may properly be considered only with respect to whatever pendent state law claims they may wish to present.

(2) If §1988 does so, should the entire statute including its measure of damages be incorporated or may the Court pick the damages allowed by some other state or may the Court determine the measure of damages or is there a federal common law of damages to which the Court could turn?

(3) If §1988 does not authorize the incorporation of the entire Colorado statute into federal law, should the Court determine that the measure of damages in a §1983-§1988 Colorado Wrongful Death case be greater than the $5,000 measure expressly provided by Congress in §1985-§1986 death actions?

(4) If the Court determines the proper measure of damages in a §1983-§1988 Colorado Wrongful Death case to be different from those expressed in the Colorado statute:

(a) Has the Court gone beyond *Erie* and created a new §1983 remedy by changing the measure of damages used in the Colorado statute?

(b) Has not the Court created two wrongful death remedies denying Colorado citizens equal privileges and immunities under its law?

(c) How should a trial court instruct and explain the difference between a Colorado Wrongful Death action and a §1983-§1988 Colorado Wrongful Death action?

Petitioner's unprecedented theory of §1983 liability and request to transform Colorado tort law into a new "constitutional tort" by the tortuous §1983-§1988 route

must surely fail. Cf. *Rizzo* v. *Goode*, 423 U.S. 362, 96 S. Ct. 598 (1976).

This Court has stated:

> "Just as '[w]e are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the broad scope its language and origins may require, *United States* v. *Price*, 383 U.S., at 801, *so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it.*" (Emphasis added) District of Columbia v. Carter, 409 U.S. 718 (1973)

CONCLUSION

For the reasons hereinabove argued, it is respectfully submitted that the trial court and the Supreme Court of the State of Colorado were entirely correct in finding, holding and ruling that the Petitioner's remedy was under the Colorado Wrongful Death Act and in rejecting the Petitioner's claim under §1983. Moreover, it is the position of these Respondents that no error was committed by the trial court or by the Supreme Court of the State of Colorado in affirming the action of the trial court in the application of the applicable law: that its findings and rulings are entirely consistent with the record as made; and accordingly, such judgment should in all respects be affirmed.

Respectfully submitted,

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